APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 5th *day of* March, 2001.

Record No. 002792
Circuit Court No. 97-1139

ALEXANDRE KONANYKHINE,
Appellant,

against

IZVESTIA NEWSPAPER, *et al.*,
Appellees.

From the Circuit Court of Arlington County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A copy,

Teste:

David B. Beach,
Clerk

By: /s/ WENDY L. TUCK
Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE
ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

ALEXANDRE KONANYKHINE
Plaintiff,

vs.

IZVESTIA NEWSPAPER, *et al.*,
Defendants.

ORDER

Upon consideration of the Motion of Defendants Izvestia and Editorial Staff of Izvestia to Vacate Default Judgment, the Memorandum of Points and Authorities in support of that Motion, the oppositions thereto, the oral argument before the Court on February 25, 2000, the record herein, and for the reasons stated from the bench, it is hereby:

ORDERED that the Motion be and hereby is GRANTED, and so the judgment entered against Defendants Izvestia Newspaper and Editorial Staff of Izvestia Newspaper is VACATED because service of process was not perfected pursuant to the "Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935," 49 Stat. 3849.

Dated: March 10, 2000

/s/
Judge William Newman
Arlington County Circuit Court

SEEN AND OBJECTED TO FOR THE REASONS STATED IN OPEN COURT:

SEEN AND OBJECTED:

/s/
JOHN C. KEENEY, JR.
RONALD J. WILTSIE, II
(VSB #30389)
KELLEEN MCGINNIS SCOTT
HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5629

/s/
J.P. SZYMKOWICZ
(#39120)
SZYMKOWICZ & ASSOCIATES, P.C.
1899 L Street, N.W., Suite 250
Washington, DC 20036
(202) 862-8500

APPENDIX C

VIRGINIA:

IN THE
ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

ALEXANDRE KONANYKHINE
Plaintiff,

vs.

IZVESTIA NEWSPAPER, *et al.*,
Defendants.

FINAL ORDER

Upon consideration of the Motion to Quash March 9, 2000 Invalid Attempt at Service and to Dismiss Pursuant to Rule 3:3 filed by defendants Izvestia Newspaper and Editorial Staff of Izvestia Newspaper, the Memorandum of Points and Authorities in support of that Motion, the opposition thereto, the oral argument before the Court, the record herein, and for the reasons stated in the Court's letter opinion dated August 25, 2000, the Court hereby finds:

(1) The only proper means of service on defendants is through letters rogatory.

(2) Service via letters rogatory was not made and, so, service was not proper in this case.

(3) Defendants' law firm did not enter a general appearance in this Court and, so, could not be properly served.

Accordingly, it is hereby ORDERED that the Motion is GRANTED, that service be QUASHED as to these defendants, and that this case is DISMISSED.

Additionally, it being brought to the Court's attention that a Notice of Appeal in this matter has already been filed as of September 22, 2000 by plaintiff, it is hereby further ORDERED that this Order be entered *nunc pro tunc* to August 25, 2000, the date of the Court's letter opinion.

Dated: October 13th, 2000

/s/
WILLIAM T. NEWMAN, JR.
Circuit Court Judge

SEEN:

/s/
RONALD J. WILTSIE, II
(VSB #30389)
HOGAN & HARTSON, L.L.P
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5629

Of Counsel:

John C. Keeney, Jr.
Kelleen McGinnis Scott
HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

SEEN AND OBJECTED
TO ON ALL GROUNDS
ASSERTED ON BRIEF
AND AT ORAL ARGUMENT:

/s/
J.P. SZYMKOWICZ
(#39120)
SZYMKOWICZ &
ASSOCIATES, P.C.
1899 L Street, N.W., Suite 250
Washington, DC 20036
(202) 862-8500

APPENDIX D

Circuit Court of Arlington County
1425 North Court House Road
Arlington, Virginia 22201

August 25, 2000

RONALD J. WILTSIE, II, ESQ.
HOGAN & HARTSON
555 13th Street, N.W.
Washington, DC 20004

J.P. SZYMKOWICZ, ESQ.
SZYMKOWICZ & ASSOCIATES
1899 L Street, N.W., Suite 250
Washington, DC 20036

Re: ***Alexandre Konanykhine v. Izvestia Newspaper, et al.***
Law No. 97-1139

Dear Counsel:

The Court has before it Defendants' Motion to Quash Service and Motion to Dismiss. After oral argument, extensive briefing, and review and consideration by the Court, it is the ruling of the Court that service be quashed and that the action against Defendant Izvestia Newspapers be and is hereby dismissed.

Based on argument, the record, and the law, the Court finds that the only proper means of service on Defendant Izvestia Newspaper is through letters rogatory. No such service was made. Thus, service was not proper in this case. The Court further finds that Defendant's firm did not enter a general appearance in this Court as argued by Plaintiff, thus they could not be properly served.

Based upon these findings, the Court quashes service and dismisses this case.

Very truly yours,

/s/ William T. Newman, Jr.
Judge

APPENDIX E

VIRGINIA:

IN THE ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

ALEXANDRE KONANYKHINE,
Plaintiff,

vs.

IZVESTIA NEWSPAPER, *et al.*,
Defendants.

FINAL JUDGMENT ORDER

This cause came before this Honorable Court on December 13, 1999 for a jury trial concerning the damages suffered by Plaintiff Konanykhine as alleged in his Motion for Judgment.

Prior to the jury trial concerning the damages suffered by Plaintiff Konanykhine as alleged in his Motion for Judgment, this Honorable Court granted Plaintiff Konanykhine's Motion for Entry of Judgment by Default against Defendant Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper.

Plaintiff Konanykhine appeared in person with his attorney and presented evidence as to the damages he suffered as a result of statements made by Defendant Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper.

Jurors were sworn to hear the evidence concerning the damages allegedly suffered by Plaintiff Konanykhine as a result of statements made by Defendant Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper. The jury, heard the evidence presented at trial, received this

Honorable Court's instructions, heard the closing arguments of counsel and retired to consider their verdict.

The jury returned a verdict awarding Plaintiff Konanykhine the sum of Thirty-three Million, Five Hundred Thousand Dollars ($33,500,000.00) against Defendant Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper.

Of the amount awarded by the jury, the sum of Three Million, Five Hundred Thousand Dollars ($3,500,000.00) represented compensatory damages and the sum of Thirty Million Dollars ($30,000,000.00) represented punitive damages.

IT IS HEREBY ORDERED THAT judgment be entered for Plaintiff Konanykhine against Defendant Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper, jointly and severally, in the amount of Thirty-three Million, Five Hundred Thousand Dollars ($33,500,000.00).

THIS ORDER IS FINAL.

December 16, 1999 /s/ WILLIAM T. NEWMAN, JR.
JUDGE
Arlington County Circuit Court

APPENDIX F

VIRGINIA:

IN THE ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

ALEXANDRE KONANYKHINE,
Plaintiff,

vs.

IZVESTIA NEWSPAPER, *et al.*,
Defendants.

ORDER ENTERING JUDGMENT FOR PLAINTIFF KONANYKHINE AGAINST DEFENDANT EDITORIAL STAFF OF IZVESTIA NEWSPAPER

Upon consideration of Plaintiff Alexandre Konanykhine's Motion for Entry of Default against Defendant Editorial Staff of Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper's Response thereto, this Honorable Court hereby finds that more than twenty-one (21) days have elapsed since valid service of process was made upon Defendant Editorial Staff of Izvestia Newspaper and that Defendant Editorial Staff of Izvestia Newspaper has not filed any responsive pleadings nor has any appearance been made in this action on Defendant Editorial Staff of Izvestia Newspaper's behalf.

Therefore, it is this 17th day of April, 1998 HEREBY ORDERED THAT Default Judgment be entered against Defendant Editorial Staff of Izvestia Newspaper. IT IS FURTHER ORDERED THAT this matter be set down for a

hearing in front of a jury on the question of the amount of Plaintiff Konanykhine's damages.

4/17/98

/s/ BENJAMIN KENDRICK
JUDGE
Arlington County Circuit Court

APPENDIX G

VIRGINIA:

IN THE ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

ALEXANDRE KONANYKHINE,
Plaintiff,

vs.

IZVESTIA NEWSPAPER, *et al.*,
Defendants.

ORDER ENTERING JUDGMENT FOR PLAINTIFF KONANYKHINE AGAINST DEFENDANT IZVESTIA NEWSPAPER

Upon consideration of Plaintiff Alexandre Konanykhine's Motion for Entry of Default against Defendant Izvestia Newspaper and Defendant Izvestia Newspaper's Response thereto, this Honorable Court hereby finds that more than twenty-one (21) days have elapsed since valid service of process was made upon Defendant Izvestia Newspaper and that Defendant Izvestia Newspaper has not filed any responsive pleadings nor has any appearance been made in this action on Defendant Izvestia Newspaper's behalf.

Therefore, it is this 17th day of April, 1998 HEREBY ORDERED THAT Default Judgment be entered against Defendant Izvestia Newspaper. IT IS FURTHER ORDERED THAT this matter be set down for a hearing in front of a jury on the question of the amount of Plaintiff Konanykhine's damages.

4/17/98

/s/ BENJAMIN KENDRICK
JUDGE
Arlington County Circuit Court

APPENDIX H

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 20th *day of* April, 2001.

Record No. 002792
Circuit Court No. 97-1139

ALEXANDRE KONANYKHINE,
Appellant,

against

IZVESTIA NEWSPAPER, *et al.*,
Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 5th day of March, 2001 and grant a rehearing thereof, the prayer of the said petition is denied.

A copy,

Teste:

/s/ DAVID B. BEACH
Clerk

APPENDIX I

EXECUTION OF LETTERS ROGATORY

Exchange of notes at Moscow November 22, 1935; related note of January 19, 1937

Entered into force November 22, 1935

49 Stat. 3840; Executive Agreement Series 83

EXCHANGE OF NOTES

The American Ambassador to the People's Commissar for Foreign Affairs

EMBASSY OF THE UNITED STATES OF AMERICA
MOSCOW, *November 22, 1935*

EXCELLENCY:

Confirming conversations between the American Embassy in Moscow and the People's Commissariat for Foreign Affairs with regard to the desirability of setting forth the procedure followed in our respective countries in the matter of the execution of letters rogatory issuing out of courts in the other, I have the honor to inform you of the conditions under which and the manner in which courts in the United States may execute letters rogatory issuing out of courts in the Union of Soviet Socialist Republics.

(1) Letters rogatory issuing out of courts in foreign countries are executed in the United States in accordance with the pertinent provisions of the laws of the United States, or of the State or Territory thereof in which resides the person whose testimony is desired, and in compliance with the rules of the executing court. The Government of the United States is, accordingly, not in a position to set forth with precision what may be the requirements of a particular court in the United States at a given time in respect of the execution of letters rogatory issuing out of a court in a foreign country. There are

appended, however, copies of the texts of federal statutory provisions now in force which relate to the taking of testimony under commissions or letters rogatory addressed by foreign courts to federal courts of the United States.

It is understood that it is the practice of American courts of appropriate jurisdiction to execute letters rogatory issuing out of foreign courts, if properly prepared and presented, and that no difficulty is likely to be encountered by Soviet courts in obtaining the execution of letters rogatory by American courts. However, should a Soviet court encounter such difficulty, my Government would, it is understood, upon its attention being drawn thereto through the diplomatic channel, consider what steps it might appropriately take with a view to eliminating the difficulty.

(2) With respect to the question of the manner of transmittal of letters rogatory issuing out of courts in the Union of Soviet Socialist Republics and addressed to courts in the United States, I have the honor to say that neither the Department of State nor any other part of the Executive Branch of the Government of the United States makes a practice of acting as a channel for the transmittal of letters rogatory issuing out of courts in foreign countries and addressed to courts in the United States. In some States of the United States, laws have been enacted requiring letters rogatory to be presented to the State court by the appropriate consular officer of the country in which the testimony is to be used. As my Government is of the opinion that this practice should generally be followed with respect to both Federal and State courts, letters rogatory issuing out of a court in the Soviet Union for execution in the United States should be presented to the court to which they are addressed by the consular officer of the Union of Soviet Socialist Republics in the United States within whose consular district the court in question is located.

(3) While my Government is not, as has been stated above, in a position to set forth with precision what the requirements of

a particular court in the United States may be at a given time in respect of the execution of letters rogatory issuing out of a court in a foreign country, my Government desires me to suggest the following points which courts in the Union of Soviet Socialist Republics may find it advantageous to observe in preparing letters rogatory for execution in the United States:

(a) The letters rogatory should be addressed by name to the court in the United States which is to execute them, if that is known; or they may be addressed "To any court of competent jurisdiction in the United States".

(b) Requests for the execution of letters rogatory should specify the name of the court out of which they issue, as well as the names of the parties to the action in which the testimony called for by the letters rogatory is desired.

(c) Requests for the execution of letters rogatory should be accompanied by English translations thereof and of accompanying documents such as exhibits and any instructions to the executing court.

With respect to the service of documents on Soviet nationals in the United States in connection with cases pending in courts in the Soviet Union, my Government has informed me that, while it cannot undertake to obligate courts or officials in the United States, no restrictions are known to exist upon the service of such documents without the application of coercion by Soviet diplomatic and consular officers in the United States.

Accept, Excellency, the renewed assurances of my highest consideration.

WILLIAM C. BULLITT

His Excellency
MAXIM M. LITVINOV
People's Commissar for Foreign Affairs
Moscow

[enclosure]

EXCERPTS FROM TITLE 28, UNITED STATES CODE

"653. * * * When letters rogatory are addressed from any court of a foreign country to any district court of the United States, a commissioner of such district court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts. (R.S. § 875; Feb. 27, 1887, C.69, § 1, 19 Stat. 241)".

Testimony for use in foreign countries

"701. *Taking*. The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories, accompanying the same, and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. And no witness shall be compelled to appear or to testify under this section except for the purpose of answering such interrogatories so issued and accompanying such commission or letters. When counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the commission or letters rogatory exclude such additional interrogatories.

The summons shall specify the time and place at which the witness is required to attend, which place shall be within one hundred miles of the place where the witness resides or shall be served with such summons. (R.S. § 4071)".

"702. *Privilege of witness.* No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discovery which shall tend to criminate him either under the laws of the State or Territory within which such examination is had, or any other, or any foreign State. (R.S. § 4072)".

"703. *Punishment of witness for contempt.* If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued, in accordance with section 701 of this title, or if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the district court of the United States. (R.S. § 4073)".

"704. *Fees and mileage of witnesses.* Every witness who shall so appear and testify shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States. (R.S. § 4074)".

The People's Commissar for Foreign Affairs to the American Ambassador
MOSCOW, *November 22, 1935*

MR. AMBASSADOR:

Confirming conversations between the People's Commissariat for Foreign Affairs and the American Embassy in Moscow with regard to the desirability of setting forth the procedure followed in our respective countries in the matter of the execution of letters rogatory issuing out of the courts in

the other, I have the honor to inform you of the procedure according to which the courts of the Union of Soviet Socialist Republics will accept for execution letters rogatory of courts in the United States of America.

1. Letters rogatory issuing out of courts in the United States for execution in the Union of Soviet Socialist Republics should be delivered through the diplomatic channel, i.e., through the American Embassy in Moscow and the People's Commissariat for Foreign Affairs, to the appropriate court in the Union of Soviet Socialist Republics and, when executed, they will be returned through the same channel.

2. Letters rogatory issued out of a court in the United States forwarded for execution in the Union of Soviet Socialist Republics should be addressed to the Supreme Court of that constituent republic which is competent to execute such letters rogatory. In case the exact title of the Soviet court is unknown to the court which issues the letters rogatory, the letters rogatory may be addressed "to the competent court of the Union of Soviet Socialist Republics".

3. Requests of courts in the United States for the execution of letters rogatory addressed to courts in the Union of Soviet Socialist Republics should specify the name of the court out of which they issue, as well as the names of the parties to the action in which the testimony called for by the letters rogatory is desired.

4. Requests for the execution of letters rogatory should be accompanied by Russian translations of all the basic documents, such as the interrogatories themselves and any accompanying instructions to the executing court. It will be sufficient in the case of documents of secondary importance to forward short summaries of their contents in the Russian language.

5. Depending upon the nature of the letters rogatory, a fee varying from five to ten dollars ($5 to $10) will be charged

for the execution of letters rogatory issued out of courts in the United States. In addition to this fee, remuneration for the services of experts as well as for the travelling expenses and expenditure of time by witnesses may be requested in individual cases, such remuneration to be based on rates current at that time fixed by law or regulation then existing. Payment of fees and other possible expenses of the nature referred to above will be effected in dollars by the American Embassy at Moscow upon receipt from the People's Commissariat for Foreign Affairs of the executed letters rogatory and an appropriate statement setting forth the amount due, and the fees and services covered thereby.

6. The court in the Union of Soviet Socialist Republics by which the letters rogatory are executed shall give effect to them in accordance with the procedural rules obtaining in the Union of Soviet Socialist Republics.

7. The court issuing the letters rogatory shall, if it so desires, be informed of the date and place where the proceedings will take place, in order that the interested parties or their legal representatives may, if they desire, be present.

8. The execution of letters rogatory issuing out of a court in the United States may be refused in whole or in part, if the appropriate authorities in the Union of Soviet Socialist Republics consider that the execution thereof would affect its sovereignty or safety. In returning letters rogatory unexecuted in whole or in part, the authorities refusing such execution shall affix under seal to the letters rogatory a written statement of the reasons for such refusal.

9. Any difficulties which may arise in connection with a request by a court in the United States for the execution of letters rogatory in the Union of Soviet Socialist Republics shall be settled through the diplomatic channel.

While letters rogatory must be transmitted through the diplomatic channel, American diplomatic and consular

institutions may, in connection with cases pending in the United States courts, serve juridical documents on American nationals within the Union of Soviet Socialist Republics, without the application of coercion.

Accept, Mr. Ambassador, the renewed assurances of my highest consideration.

M. LITVINOFF

Mr. WILLIAM C. BULLITT
Ambassador of the United States of America
Moscow

RELATED NOTE

The Vice Director of the Legal Division of the People's Commissariat for Foreign Affairs to the American Chargé d' Affaires ad interim

COMMISSARIAT DU PEUPLE
POUR LES AFFAIRES ETRANGERES

MOSCOW, *January 19, 1937*

DEAR MR. HENDERSON,

Confirming our recent conversation I have the honor to inform you that in view of legislation now in force in the Union of Soviet Socialist Republics the payment of fees and other possible expenses to be charged for the execution of letters rogatory in accordance with the note of the Soviet government of November 22, 1935, should be effected in Soviet currency, the amounts to be paid in rubles to form the equivalent of the fees expressed in dollars in the above-mentioned note.

Sincerely yours,

M. PLOTKIN

Mr. LOY W. HENDERSON
Chargé d'Affaires ad interim
of the United States of America
Moscow, U.S.S.R.

APPENDIX J

Izvestia Letterhead
(Letterhead was in Russian, remainder of pleading was in English)

07.05.98 No. 140/02.1-3

FILED
JUN 23 1998
DAVID A. BELL, CLERK
Arlington County Circuit Court
By _____ Deputy Clerk

USA, Virginia
District court Arlington

On the fifth of February we had honour to send You our answer to the claim of Mr. Alexander Kononykhin.

In the received by us copy of claimant's advocates letter addressed to the court there is an assertion that we allegedly did not react to the court's notice about the claim occurrence.

Being aware that the post office on some reasons may have not delivered to the court our answer to the A. Kononykhin claim, we are sending You a copy of this answer.

Annex—our answer 2 pages.

With high regards

/s/ D. MURZIN

Izvestia Letterhead
(Letterhead was in Russian, remainder of pleading was in English)

USA, VIRGINIA
District court Arlington

OAO "Editorial staff "Izvestija" witnesses its esteem towards the District court Arlington. As for the claim of Mr. Alexander Konanykhin which came in to us we have the honour to report the following.

I

Publications about the plaintiff that occurred in "Izvestija" are completely based upon the information received from General Procurator office of the Russian Federation which proceeds investigations concerning A. Konanykhin.

In accordance with Paragraph 3 article 57 Law of Russian Federation "Mass media activities", Editorial staff and journalists are not responsible for the dissemination of data "if these data are inserted in answer to request about information". Information disputed by the plaintiff was not only received according to an inquiry on the part of Editorial staff contributors; but it had been sent by the General Procura-tor office of Russia to FBI.

II

In harmony with Article 117 Civil Processual Code of RF cases about claims toward mass media editorial staffs have to be considered in courts at whereabouts of defendants.

Plaintiff is a citizen of Russia, address of our Editorial office is well know to him. So the plaintiff and his advocates have no hindrances to bring a claim to Russian defendant at territory of Russia and according to Russian laws.

III

Indicated in claim of Konanykhin as defendant firm IRI is no "Izvestija" property. According to our information this firm is currently liquidated.

With high regards

OAO 'Editorial staff Izvestija'
/s/ D. MURZIN
President

APPENDIX K

FORUM FINANCIAL GROUP, LLC, *ET AL.*, PLAINTIFFS v. PRESIDENT AND FELLOWS OF HARVARD COLLEGE, *ET AL.*, DEFENDANTS

CIVIL NO. 00-306-P-H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

199 F.R.D. 22; 2001 U.S. Dist. LEXIS 5961

February 16, 2001, Decided

MEMORANDUM DECISION AND ORDER ON PLAINTIFFS' MOTION FOR COURT-DIRECTED SERVICE OF PROCESS

The plaintiffs have moved for court-directed service of process under Federal Rule of Civil Procedure 4(f)(3). They have been unsuccessful in their own attempts to serve the defendant Jonathan Hay, an American who, they assert, resides in Russia. Specifically, the plaintiffs have requested court-directed service upon Hay by certified mail to his attorney, Jonathan S. Spiegel, Esq. of Skadden, Arps, Slate, Meagher & Flom, LLP in New York City. Attorney Spiegel recently accepted service on Hay's behalf in another federal case that, like this one, involves Hay's business dealings in Russia. The plaintiffs have also moved that I deem such service "good and sufficient." I GRANT the plaintiffs' motion insofar as it requests court-directed service upon Hay by certified mail to Attorney Spiegel, but I cannot determine at this time whether any resulting service is "good and sufficient" and therefore DENY that part of the motion.

Federal Rule of Civil Procedure 4(f) provides that service upon individuals in a foreign country may be accomplished:

> (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents[1]; or
>
> (2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:
>
> > (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
> >
> > (B) as directed by the foreign authority in response to a letter rogatory or letter of request; or
> >
> > (C) unless prohibited by the law of the foreign country, by
> >
> > > (i) delivery to the individual personally of a copy of the summons and the complaint; or
> > >
> > > (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or
>
> (3) by other means not prohibited by international agreement as may be directed by the court.

Attorney Spiegel, opposing the plaintiffs' motion,[2] first contends that court-directed service under Rule 4(f)(3) is not

---

[1] Russia is not a signatory, to the Hague Convention on the Service Abroad of Judicial and Extrajudicial documents.

[2] It is unclear whether the Plaintiffs' motion is properly opposed. To be sure, Attorney Spiegel submitted a letter arguing that the motion should be denied, but in doing so he disclaimed any intent to make an appearance in this litigation. Furthermore, Spiegel's letter forthrightly

generally available unless attempts at service by means authorized by any applicable international agreement have proven unsuccessful. He asserts that court-directed service is "extraordinary relief" that is inappropriate in this case because the plaintiffs have not attempted to serve Hay by letter rogatory. He asserts that the latter method is allowed under a 1935 agreement between the United States and the Union of Soviet Socialist Republics (U.S.S.R.). *See Exchange of Notes Relating to the Execution of Letters Rogatory, Nov. 22, 1935*, U.S.-U.S.S.R., 49 Stat. 3840, E.A.S. No. 83 (the "1935 Agreement"). Contrary to these assertions, nothing in Rule 4(f) or its advisory committee notes indicates that court-directed service under Rule 4(f)(3) is "extraordinary relief." By its plain language and syntax, Rule 4(f)(3)'s alternative is not a last resort, nor is it any less favored than service under subsections (1) and (2).[3] Rule 4(f)'s plain language unambiguously indicates that the only limit it imposes on court-directed service under

---

noted that he is not admitted to practice in the District of Maine (and he has not been admitted *pro hac vice*) and states that he is not authorized to appear in this action of Hay's behalf. Because I grant the plaintiffs' motion, any issues these shortcomings might raise otherwise are of no present importance.

[3] The court's contrary statement in *Graval v. P.T. Bakrie & Bros.*, 986 F. Supp. 1326, 1330 (C.D. Cal. 1996), is based on the following advisory committee notes regarding Rule 4(f)(2): "Service by methods that would violate foreign law is not generally authorized. Subparagraphs (A) and (B) [of Rule 4(f)(2)] prescribe the more appropriate methods for conforming to local practice or using a local authority." In my view, that language simply does not address Rule 4(f)(3). Rather, it indicates only that under Rule 4(f)(2) service by means in accordance with the foreign country's law or as directed by the appropriate foreign authority is preferred over service by means merely not prohibited by the foreign country's laws. I will not extend the notes to stand for the proposition, contrary to the plain language of Rule 4(f)(3), that service under Rule 4(f)(2)(A) and (B) should or must be attempted before court-directed service under Rule 4(f)(3) is allowed.

Rule 4(f)(3) is that the means must not be prohibited by international agreement. *Accord* David D. Siegel, Supplementary Practice Commentary C4-24, 28 U.S.C.A. Fed. R. Civ. P. 4, at 73 (West Supp. 2000) ("It is only a method barred by 'international agreement', and presumably *specifically* barred by that agreement, that the court must stay away from.") (emphasis in original). Moreover, the 1935 Agreement between the United States and U.S.S.R. — if it is even applicable[4] — merely sets forth procedures for executing letters rogatory; it does not prohibit other means of service. Because no international agreement prohibits me from directing service on Hay via certified mail to Spiegel, neither does Rule 4(f)(3).

Attorney Spiegel also contends that, apart from any Rule 4(f) concerns, service on a party through an attorney who is not authorized to accept such service (he states he is not authorized) is generally inappropriate because it risks adversely affecting the attorney-client relationship. This contention is important, and Attorney Spiegel cites several cases standing for the proposition that, in the ordinary course, service of process on a party via his or her attorney is not effective unless that attorney is authorized to accept service. *See, e.g.*, *Williams v. Jones*, 11 F.3d 247, 251 (1st Cir. 1993) ("'Service of process is not effectual on an attorney solely by reason of his capacity as an attorney, [but] the party must have appointed his attorney as his agent for service of process.'") (*dicta*) (alterations in Williams) (*quoting Durbin*

---

[4] The continuing validity and applicability of the 1935 Agreement with the U.S.S.R. (not Russia) is unclear. Compare *Semtek Int'l Inc. v. Merkuriy Ltd.*, 1996 U.S. Dist. LEXIS 22248, *5 (D. Mass. 1996) (stating that service in Russia is proper if accomplished by means of a letter rogatory pursuant to the 1935 Agreement) with U.S. Dep't of State, Judicial Assistance in the Russian Federation, available at http://travel.state.gov/russia_legal.html (last visited Feb. 16, 2001) ("At present, no bilateral agreement on judicial assistance exists between the United States and Russia.").

Paper Stock Co. v. Hossain, 97 F.R.D. 639, 639 (S.D. Fla. 1982); *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1094 (2nd Cir. 1990) ("Service of process on an attorney not authorized to accept service for his client is ineffective."). Those cases are distinguishable, however, because they do not involve court-directed service as is requested here, but only the parties' own attempts at service without prior court authorization. *See Int'l Telemedia Assocs., Inc. v. Diaz*, 245 B.R. 713, 720-21 & n.6 (N.D. Ga. 2000) (directing service under Rule 4(f)(3) on a foreign defendant by electronic mail and distinguishing a case rejecting service by electronic mail where the court's prior authorization had not been obtained). Where, as here, a party moves for court-directed service under Rule 4(f)(3), the court's decision to grant or deny the motion after careful consideration of the particular facts of the case can safeguard the attorney-client relationship against any unwarranted intrusion. *Cf. Mayatextil v. Liztex*, 1994 U.S. Dist. LEXIS 6663, 1994 WL 198696, *5 (S.D.N.Y. 1994) ("Absent some proffer of how service on counsel under the facts of this case is inadequate to provide fair notice, counterclaim defendants' sweeping objections are insufficient to overcome the obvious need for court-designed service."); *Int'l Telemedia*, 245 B.R. at 719 (stating that Rule 4(f)(3) provides flexibility and discretion that empowers courts to "fit the manner of service utilized to the facts and circumstances of the particular case"); *Siegel*, *supra*, at 73 ("Paragraph (3) of subdivision (f) is a catch-all provision that enables the court on *ex parte* motion to devise a method of service responsive to the unique facts of the case."). In this case, based upon the representations made at this point in the proceedings,[5] I conclude that service of process via Spiegel is

---

[5] Employing local counsel in Russia, the plaintiffs have attempted to serve Hay by certified mail and by hand, at both his home and business addresses. Chizhikova Decl. P 7. The plaintiffs' local counsel asserts that Hay has actively evaded her efforts to serve him, *id.*, that he is now living under an assumed name, and that she cannot find him. Supplemental

appropriate given Hay's efforts to evade service in Russia and Spiegel's recent acceptance of service on Hay's behalf in a case also involving Hay's business dealings in Russia, *United States v. President & Fellows of Harvard College*, Civ. No. 00-11977DPW (D. Mass filed Sep. 26, 2000). Such service via Attorney Spiegel is likely to fulfill the due process requirement of being reasonably calculated to give Hay notice of the case and an opportunity to be heard. *United States v. One Urban Lot*, 885 F.2d 994, 998-99 (1st Cir. 1989) ("Well-known and oft-repeated Supreme Court precedent states that notice of a legal proceeding satisfies due process even if not-actually received so long as 'notice is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'") (*quoting Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950)). Notably, Attorney Spiegel does not argue that sending service to him would fail to give Hay fair notice, nor does he assert that he is not in contact with Hay.

I do not decide whether court-directed service on Hay via Attorney Spiegel complies with Russian law. That element does not affect my Order, but it may very well affect the plaintiff's ability ultimately to enforce any judgment in Russia.

SO ORDERED.

DATED THIS 16TH DAY OF FEBRUARY, 2001.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

Chizhikova Decl. P 4. The plaintiffs also assert that they would be prejudiced if forced to attempt to serve Hay by letter rogatory because the attempt would not be successful but would take between six months and one year to complete. Pl.'s Reply to Opp'n to Mot. for Court-Directed Service at 5.

APPENDIX L

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

1996 U.S. Dist. LEXIS 22248

C.A. NO. 95-11820-RCL

SEMTEK INTERNATIONAL INCORPORATED,
Plaintiff,

v.

MERKURIY LTD. and PYOTR SIVIRIN,
Defendants.

August 13, 1996, Decided

MEMORANDUM AND ORDER

Lindsay, District Judge.

This case is before the court on the defendants' motion pursuant to Fed. R. Civ. P. 60(b)(4) to vacate the default judgment entered against them on April 24, 1996. The defendants contend that they were improperly served in the Russian Federation ("Russia"), and that therefore, this court lacks personal jurisdiction over them. For the reasons set forth below, the motion is GRANTED and the plaintiff's service upon the defendant is quashed and the default judgment against the defendants is VACATED.

A. *Relevant Facts*

Following is a summary of the material facts taken from the affidavits of Leslie N. Reizes, plaintiff's counsel, and defendant Pyotr Sivirin. These facts are not in dispute.

On August 15, 1995, the plaintiff, Semtek International Incorporated ("Semtek"), a Massachusetts company, filed a complaint in this court against the defendants, a Russian company, Merkuriy Ltd. ("Merkuriy") and its Director, Pyotr Sivirin ("Sivirin"), a Russian national domiciled and residing in Siberia. The suit stems from an alleged joint venture agreement between Semtek and Merkuriy to make Russian-owned satellites available on the international telecommunications market.

The plaintiff first attempted service of process on August 21, 1995, by mailing the following items to the defendants at Sivirin's address in Siberia: the complaint, a request for waiver of service of summons, an international reply coupon for return of the waiver, and a letter of transmittal that read "if they are not returned to me in a timely manner, under the treaty between the United States and Russia, I will have to have the summons and complaint translated and served upon you through diplomatic channels of the United States and Russia." All of the documents were in English only.

Sivirin, who speaks no English, received the documents, and forwarded them to his attorney, Nikolay V. Prokhorov ("Prokhorov"), in Moscow, Russia. Prokhorov also represents the Merkuriy company.

On September 18, 1995, Prokhorov responded to the attempted service by faxing a letter to plaintiff's counsel. The waiver form was not returned. In his letter, Prokhorov stated that service upon his clients had been improper and that his clients would not pay attention to any judicial papers "if not served in Russia in accordance with the *Convention de la Haye of October 5, 1961*".

The plaintiff's counsel replied to Prokhorov's letter on September 22, 1995, by asking the defendants to reconsider accepting informal service of process. Prokhorov responded by facsimile letter on September 29, 1995, stating that the United States and Russia recognize the Hague Convention of

1961 and that Russia has a right not to accept service that is "in contradiction with the mutual international obligations of Russia and the countries from which the documents are served."

On December 5, 1995, the plaintiff attempted to serve the defendants in Russia for a second time. This second service was made in accordance with the *Hague Convention of 1965 on the Service Abroad of Judicial and Extrajudicial Documents*, 28 U.S.C., Fed. R. Civ. P. 4. The plaintiff sent the summons and complaint, together with a Russian translation, to the defendants by registered mail.

Sivirin claims that he never received the documents that the plaintiff sent to him in this second attempt at service. Prokhorov, however, received for Merkuriy the documents that were sent to him in Moscow.

Neither of the defendants answered the complaint, a default judgment was entered against them on April 24, 1996 for $381,396,000.

B. *Discussion of the Law*

1. *Standard for Proper Service in Russia*

Service upon both individuals and corporations in a foreign country is governed by 28 U.S.C., Fed. R. Civ. P. 4(f). Rule 4(f)(1) states that service in a foreign country may be effected by "any internationally agreed means reasonably calculated to give notice". "When service is to be effected outside a judicial district of the United States, the methods of service appropriate under an applicable treaty shall be employed if available." *See Advisory Committee Notes to the 1993 Amendments to the Federal Rules of Civil Procedure.*

There is a mutually-agreed upon means of service of process between Russia and the United States: the "*Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow*

November 22, 1935" (the "Moscow Agreement"), codified as 49 Stat. 3849; Executive Agreement Series 83. Pursuant to the Moscow Agreement, the service of United States judicial documents upon a defendant in Russia is proper if it is accomplished by means of a letter rogatory.

In this case, the plaintiff attempted service by mail, not letters rogatory. The plaintiff claims that letters rogatory, while sufficient, are not the exclusive means of service in Russia because there is nothing in the Moscow Agreement that precludes other forms of service. The plaintiff contends that his second service by mail was proper because it is one of the alternative methods that are listed in Rule 4(f)(2)(C).

Pursuant to Rule 4(f)(2)(C)(ii), service may be effected by "any form of mail requiring a signed receipt to be addressed and dispatched by the clerk of the court to the party to be served." In this case, the documents were addressed and dispatched from Ithaca, New York by plaintiff's counsel, and not the clerk of this court as required by (f)(2)(C)(ii). Thus, even if service by mail were proper in this case, sufficient service was not effected under (2)(C)(ii) because the summons and complaint were improperly dispatched. Service by mail is improper if addressed and dispatched by the plaintiff rather than by the clerk of the court as required by Rule 4(f). *G & H Partners v. Boer Goats International Limited*, 896 F. Supp. 660, 663 (W.D. Tex. 1995); *See* Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure*, Vol 4A § 1134 at 58 (1996 Supp.).

Moreover, Rule 4(f)(2) precludes service upon a foreign defendant which would violate the law of the country in which service is to be made. Rule 4(f)(2)(A) requires that service be made "in the manner prescribed by the law of the foreign country." Rule 4(f)(2)(C) allows for service "unless prohibited by the law of the foreign country". The only time that service may be accomplished in contravention of the laws of the foreign country is by order of the court.

Rule 4(f)(3). No such order was ever sought or granted in this case.

While there is nothing in the Moscow Agreement which explicitly precludes other methods of service other than letters rogatory, a Supreme Soviet decree strongly indicates that this is the case. *"Acknowledgment of the Decisions of Foreign Courts and Courts of Arbitration in the U.S.S.R 9131-xi"*, 26 Vedomosti SSSR item 427 (1988). According to the directive, which Russia has recognized since 1991, the one exception to service by letters rogatory is service by an agent or through international registered mail with prior permission from a Russia court.

Moreover, the General Counsel of the Administrative Office of the United States Courts has advised all district courts that service by mail is not acceptable in Russia. *Memorandum of General Counsel of the Administrative Office of the United States Courts, "Service of Process in Foreign Countries"* (November 6, 1980). The memorandum requests that clerks of court "refrain from sending summonses and complaints by international mail to foreign defendants in those countries which have protested service by international mail, namely Czechoslovakia, Switzerland, and the Union of Soviet Socialist Republics. *In those countries, letters rogatory are the appropriate mechanism for service.*" (italics in the text).

In this case, the plaintiff served the defendant by international registered mail, but without permission of a Russian court. Service in this manner did not comport with the Moscow Agreement, and it directly contravened the 1988 Supreme Soviet directive.

2. *The Issue of Waiver of Service*

The plaintiff claims that the defendants have waived any objection to the manner of service because service was made as defendants requested. This assertion is simply wrong.

Defense counsel asked for service in accordance with the Hague Convention of *1961*, namely the *Hague Convention of 1961 Abolishing the Requirement of Legalization for Foreign Public Documents*, this convention eliminates the system of authentication procedures of foreign public documents and relates to Fed. R. Civ. P. 44(a)(2). It does not recite any information with regard to service of process. The plaintiff, however, served the defendants in accordance with the Hague Convention of 1965. The defendants never requested or agreed to service by the terms of the Hague Convention of 1965. Thus even if service were waived, the waiver was conditional, and the plaintiff failed to meet those conditions.

The plaintiff next claims that defense counsel waived service of the summons and complaint by acknowledging receipt of the complaint in two facsimile letters he sent to the plaintiff. The plaintiff contends that this response supports the proposition that the defendants had received sufficient notice of the complaint that had been filed against them. Defense counsel's acknowledgment of receipt of service does not constitute waiver of service for purposes of Rule 4. "Actual notice itself, without more, is insufficient to satisfy the requirements of 4(d)(1)." *DeFazio v. Delta Air Lines, Inc.*, 849 F. Supp. 98, 103 (D. Mass. 1994) *aff'd*, 34 F.2d 1065 (1st Cir. 1994), *citing Precision Etchings and Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21, 24 (1st Cir. 1992).

Speaking generally and as to both claims of waiver, this court notes that Rule 4(d) details the manner in which formal service may be waived by a defendant. A plaintiff wishing to take advantage of the waiver procedure must satisfy the requirements of Rule 4(d)(2). In order to waive formal service, a defendant must sign and return the waiver form "1B", which was adopted as part of the 1993 Amendments to the Federal Rules of Civil Procedure.

The defendants never completed, nor returned, any waiver form to the plaintiff or to any court in the United States.

Thus, the defendants cannot be judged to have waived their right to service.

C. *Service Must be Quashed*

"The courts have broad discretion to dismiss the action or to retain the case but quash the service that has been made on the defendant," when improper service has been made. Wright and Miller, Vol. 5A § 1354 at 288. Dismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained. In such instances, the district court should, at most, quash service, leaving the plaintiff's free to effect proper service. *Richardson v. Ingram Corp.*, 374 F.2d 502, 503 (3rd Cir. 1967) *cert. denied*, 389 U.S. 866, 19 L. Ed. 2d 139, 88 S. Ct. 134 (1967). *See also Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (11th Cir. 1993), *cert. denied* 510 U.S. 818, 114 S. Ct. 72, 126 L. Ed. 2d 41 (1993). It appears that proper service still is possible in this case. Accordingly, the court will quash service, retain the case on its docket and give the plaintiff an opportunity properly to serve the defendants.

D. *Conclusion*

For the foregoing reasons, service of the summons and complaint upon the defendants is quashed and the defendants' motion to vacate the default judgment is GRANTED. Service shall be made within 120 days of the date of this order unless otherwise ordered by the court.

SO ORDERED.

Reginald C. Lindsay

United States District Judge

DATED: 8/13/96

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 97-10409-GAO

J L REARDON ASSOCIATES, LTD.,
Plaintiff,

v.

NPO ENERGOMASH; ENERGO, INC.; R.D. AMROSS, L.L.C.; PRATT & WHITNEY GOVERNMENT ENGINES AND SPACE PROPULSION COMPANY, a unit of UNITED TECHNOLOGIES CORP.; BORIS I. KATORGIN; GENNADY G. DERKACH, and VICTOR A. SIGAEV,
Defendants,

and

R.D. AMROSS. L.L.C.; UNITED TECHNOLOGIES CORP.; and LOCKHEED MARTIN CORPORATION,
Reach and Apply Defendants.

MEMORANDUM AND ORDER
March 26, 1998

O'TOOLE, D.J.

The claims in this action all stem from a series of agreements between plaintiff J.L. Reardon Associates, Ltd. ("Reardon Associates"), a Massachusetts corporation, the defendant NPO Energomash ("Energomash"), a Russian corporation under the control of the Russian Space Agency, and its subsidiary, the defendant Energo, Inc. ("Energo'), a Delaware corporation with a principal place of business in Khimky, Russia.

The relationship between the parties began on August 29, 1990, when, pursuant to a written contract, Energomash appointed Reardon Associates as its sole representative in North America for the development and negotiation of sales regarding Energomash's rocket engine technology. After several years and a series of agreements restructuring the original one, the relationship has degenerated to the point where Reardon Associates filed this suit alleging a variety of claims against Energomash, Energo, several individual directors of Energo and representatives of Energomash, Amross, L.L.C. ("Amross"), and Pratt & Whitney Government Engines and Space Propulsion Company ("Pratt & Whitney").

Presently, five motions are before the Court.

1. *Motion to dismiss by Amross*

The complaint alleges the tort of intentional interference with contractual relations against Amross (Count VII). Amross moves to dismiss for lack of personal jurisdiction or, in the alternative, to dismiss for failure to state a claim upon which relief can be granted. In assessing this motion to dismiss for lack of personal jurisdiction, it is appropriate to use the *prima facie* standard of analysis, considering "only whether the plaintiff has proferred evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction." *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992).

Amross is a Delaware limited liability company with a usual place of business in Florida. It is a joint venture, established in July 1996 to manage the production and sale of an Energomash liquid-fueled rocket engine to the Lockheed Martin Corporation in conjunction with Lockheed Martin's development of the Atlas space vehicle. Reardon Associates does not dispute that Amross itself has had no contact with Massachusetts, but argues that this Court has personal

jurisdiction over Amross under the section of the Massachusetts long-arm statute which holds that "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or in equity arising from the person's . . . causing tortious injury by an act or omission in this commonwealth." Mass. Gen. L. ch. 223A. § 3(c). Reardon Associates argues that "[i]n the instant case, the claims are directly related to the acts or omissions of Amross, its agents or co-conspirators which were intended to — and did — cause injury in Massachusetts." (Pl.'s Opp'n to Def. R.D. Amross' Mot. to Dismiss at 2.)

First. Reardon Associates claims that Amross intentionally and improperly induced Energomash to breach its contract with Energo and Reardon Associates, and induced Energo to breach its contract with Reardon Associates, thereby causing injury in Massachusetts. It appears that Reardon Associates misunderstands the long-arm statute. "By its terms § 3(c) requires not only 'tortious injury' in Massachusetts, but also an act there." *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1027 (2d Cir. 1997). Reardon Associates does not allege that Amross acted tortiously or otherwise in Massachusetts.

It may be that Reardon Associates meant to allege that Amross committed a tortious act *outside* the commonwealth that caused injury in the commonwealth, a circumstance suggesting jurisdiction under § 3(d) of the long-arm statute, but only if the alleged tortfeasor "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, . . . in this commonwealth." There is no evidence in this record that this critical condition has been satisfied. Neither §§ 3(c) nor 3(d) provides a basis for jurisdiction over Amross.

Reardon Associates also argues that Energomash and Pratt & Whitney (which jointly own Amross) are "agents' of

Amross, so that Amross can be sued for the acts of its agents. However, Reardon Associates does not explain how Energomash and Pratt & Whitney can be considered its "agents."[1]

Reardon Associates also argues weakly, without any substantial factual support. that Amross should be considered a co-conspirator of Energomash and Pratt & Whitney and others within the reach of the Massachusetts long-arm statute. *See Glaros v. Perse*, 628 F.2d 679, 681 (1st Cir. 1980). No basis for such jurisdiction appears.

For the foregoing reasons, Amross motion to dismiss for lack of personal jurisdiction is GRANTED.

2. *Pratt & Whitney's Motion to Dismiss all Substantive Counts*

Reardon Associates brings two counts against Pratt & Whitney, alleging intentional interference with contractual relations (Count VII) and fraud (Count X). Pratt & Whitney has moved to dismiss Count VII for failure to state a claim, and Count X for failure to plead fraud with particularity.

The claim of intentional interference with contractual relations requires proof of: (1) the existence of a business or contractual relationship; (2) the defendant's knowing interference with that relationship; (3) improper means or motive on the part of the defendant; and (4) damages. *Cigna Fire Underwriters Co. v. MacDonald & Johnson, Inc.*, 86 F.3d

---

[1] Normally, when an agency relationship is asserted between a subsidiary company and its parent, a plaintiff is seeking to hold a parent liable for the acts of its subsidiary, not the other way around. It may be theoretically conceivable that a subsidiary could be held liable for the actions of a parent corporation. However, Reardon Associates actually alleges that Energomash and Pratt & Whitney "participate in and control Amross." (Pl.'s Opp'n to Def. Amross' Mot. to Dismiss at 3.) In light of this allegation, it might be that Amross was an agent of Energomash and Pratt & Whitney, but not the other way around.

1260, 1267 (1st Cir. 1996). In the complaint, Reardon Associates alleges contractual relationships between Reardon Associates and Energomash, and between Reardon Associates and Energo. Reardon Associates further alleges that Pratt & Whitney entered into a contract with Energomash that was in direct violation of Reardon Associates contract. Pratt & Whitney argues that Reardon Associates has failed to allege improper motive or purpose. Reardon Associates' allegations, if established by proof, are sufficient to support this element. The motion to dismiss Count VII is DENIED.

In fraud cases, the threshold for dismissal is elevated by Rule 9(b)'s requirement that fraud must be pled with particularity. *Royal Business Group, Inc. v. Realist. Inc.*, 933 F.2d 1056, 1065 (1st Cir. 1991). This rule has been understood as requiring that fraud claims specify "the time, place, and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred." *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226. 228 (1st Cir. 1980). In Count X, Reardon Associates alleges that Energomash, "on behalf of itself and Pratt & Whitney, has made false material representations" but it does not allege that Pratt & Whitney itself did so. In its opposition to Pratt & Whitney's motion, Reardon Associates points to several other paragraphs (¶¶ 19, 26-27, 29-32, 34, 40-49) in the complaint which are the basis of the fraud claim. (*See* Pl.'s Opp'n to Def. Pratt & Whitney's Mot. to Dismiss at 4-5.) These paragraphs allege that Reardon Associates contacted Pratt & Whitney on behalf of Energomash in the fall of 1992, that Pratt & Whitney and Reardon Associates negotiated for the right to sell and distribute Energomash technology, and that Pratt & Whitney entered into an agreement with Energomash. Nowhere in these allegations is there a suggestion that Pratt & Whitney made any false representations to Reardon Associates. Not only has Reardon Associates failed to allege fraud with particularity, it has failed to allege fraud at all.

Pratt & Whitney's motion to dismiss is GRANTED as to Count X.

3. *Energo's Motion to Dismiss*

Energo moves to dismiss for failure to state a claim under the sole count against it alleging breach of contract (Count I).

On June 23. 1993. Joseph L. Reardon. as president of Energo, signed a "representative agreement" with Energomash providing for payment to Energo of commissions ranging from five to ten percent of the value of certain of Energomash's future contracts. At the same time, Mr. Reardon as president of Reardon Associates signed a "representative agreement" with Energo providing for payment to Reardon Associates of commissions ranging from thirty to seventy percent of the commissions received by Energo from Energomash. The existence of these contracts is not disputed. Count I of the amended complaint alleges, among other things, that Energo breached its contract with Reardon Associates "by failing to make accumulated commission payments." This allegation is in itself sufficient to state a claim upon which relief may be granted. While Energo argues that the fact that Mr. Reardon was president of both companies at the time the contract at issue was made gives rise to a potential defense that the contract is void for self-dealing, the enforceability of the contract and the circumstances surrounding its formation are not suitable for adjudication on a motion to dismiss. Energo's motion to dismiss is DENIED.

4. *Reardon Associates' Motion to Serve Process Outside the United States*

Reardon Associates requests permission to serve process upon Energomash and the individual defendants Boris I. Katorgin, Gennady G. Derkach, and Victor A. Sigaev (collectively, "the Russian defendants") by facsimile

transmission, and in fact to regard the facsimile transmission completed on March 27, 1997, as effective service.

These defendants assert the Foreign Sovereign Immunities Act of 1975 ("FSIA"), 28 U.S.C. § 1602 *et seq.*, applies to service of process upon them. If so, service of process is governed by § 1608 of the Act. *See* Fed. R. Civ. P. 4 (j)(1) ("Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608"). The relevant portion of the statute requires that if no special arrangement between the parties exists, service must be made either by service on a previously designated agent in the United States or "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. § 1608(b)(2).

Even if the defendants are not covered under the FSIA, service upon both individuals and corporations in a foreign country requires that service be effected "by any internationally agreed means reasonably calculated to give notice." Fed. R. Civ. P. 4 (f)(1).

So, whether the Russian defendants are considered agents of the state or not, service must be effected according to a mutually-agreed upon means of service of process between Russia and the United States. *The "Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935,"* 49 Stat. 3849; Executive Agreement Series 83, requires service by letters rogatory. *See Semtek Intl. Inc. v. Merkuriy Ltd.*, No. 95-11820-RCL, slip op. at 3-4 (D. Mass. Aug. 13, 1996).

Accordingly, the motion to serve process by facsimile, *nunc pro tunc* and/or prospectively, is DENIED.

5. *Russian Defendants' Motion to Dismiss Amended Complaint*

The Russian defendants (Energomash and the individual defendants) have also moved to dismiss all substantive counts against them for insufficiency of process, lack of personal jurisdiction. and improper venue.

As discussed above, service of process upon them was improper. However, as there is reasonable prospect that service may yet be obtained, this Court will grant leave for the plaintiff to effect proper service. *See Semtek*, No. 95-11820-RCL at 7. If proper service is effected, and if the parties so move, the Court will consider other grounds for dismissal of these counts at that time.

CONCLUSION

For the forgoing reasons, the motion by defendant Amross to dismiss Count VII as against Amross for lack of personal jurisdiction is granted. Pratt & Whitney's motion to dismiss is denied as to Count VII and granted as to Count X. Energo's motion to dismiss Count I is denied. Reardon Associate's motion to serve process outside of the United States by facsimile is denied. The Court hereby grants plaintiff J.L. Reardon Associates, Ltd. ninety days to effectuate service under the applicable international agreements.

It is SO ORDERED.

March 26, 1998

/s/ _____
DISTRICT JUDGE